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FEDERAL COMMUNICATIONS COMMISSION
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Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of 1998 Biennial Regulatory Review – Reform of the International Settlements Policy and Associated Filing Requirements Regulation of International Accounting Rates	**IB Docket No. 98-148** **CC Docket No. 90-337**

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FEDERAL COMMUNICATIONS COMMISSION
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COMMENTS OF TELEFÓNICA INTERNATIONAL, S.A.

INTRODUCTION AND SUMMARY

Pursuant to Section 1.415 of the Commission's Rules, 47 C.F.R. § 1.415, Telefónica International, S.A. ("TISA") hereby submits these comments in response to the Notice of Proposed Rulemaking ("NPRM") issued in the above-captioned proceeding.[1] In the NPRM, the Commission proposes a number of significant changes to the Commission's International Settlements Policy ("ISP").

While TISA generally supports the proposed changes, the Commission should consider two pro-competitive modifications to the NPRM proposals. **First**, TISA proposes that the Commission no longer apply the ISP to foreign carriers that possess greater than 50 percent market share once a non-dominant carrier in the same market has entered into a settlement agreement with

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[1] See In the Matter of 1998 Biennial Regulatory Review – Reform of the International Settlements Policy and Associated Filing Requirements; Regulation of International Accounting Rates, IB Docket No. 98-148 and CC Docket No. 90-337, *Notice of Proposed Rulemaking* (August 6, 1998) ("NPRM").

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a U.S. carrier. Once there is more than one foreign correspondent in the foreign country, then there is no danger of "whipsawing." Where there is competition, the limitations imposed by the ISP are no longer necessary, and would actually impede competition in negotiating settlement agreements.

Second, TISA supports the Commission's use of benchmark rates as the basis for determining whether the ISP should be lifted entirely with respect to particular WTO Member countries. However, once a dominant carrier has entered into a settlement agreement with U.S. carriers at the benchmark rate, and is willing to enter into agreements with other U.S. carriers at the benchmark rate, then U.S. carriers should be permitted to enter into alternate agreements with that carrier.

I. APPLICATION OF THE ISP ON COMPETITIVE ROUTES

On routes where there is competition in terminating U.S.-originated traffic, the Commission should permit all carriers to enter into alternative agreements with carriers from WTO Member countries that do not conform to the ISP. In the NPRM, the Commission tentatively concludes that it will no longer apply the ISP and related filing requirements to settlement agreements with foreign carriers that lack market power and that are from WTO Member countries. The Commission should increase competition further by extending the benefit of the proposed exception to foreign carriers from WTO Member countries that possess greater than 50 percent market share once another carrier in the same market has entered into a settlement agreement with a U.S. carrier pursuant to the exception.

The Commission's proposal to exempt non-dominant carriers from the ISP is based on its conclusion that such carriers will not have the ability to whipsaw U.S. carriers. The Commission correctly recognized that "an attempt at whipsawing by a foreign carrier that lacks market power should be countered by a defection by U.S. carriers to another operator."[2]

If a non-dominant foreign carrier has demonstrated that its facilities are capable of terminating traffic for a U.S. carrier and has entered into an agreement for that purpose, then the market for international termination services is competitive. A carrier that is "dominant" in an adjacent market, such as local exchange services, could not thereafter seek to "whipsaw" U.S. carriers because U.S. carriers would have at least one competitive alternative to terminate international services.[3] Where there is competition to terminate international traffic, the essential concerns of the ISP will have been addressed, and the

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[2] NPRM at ¶ 20.

[3] In this respect, TISA's proposed amendment is fundamentally unlike the argument raised by several commenters in the Commission's Foreign Participation NPRM, who suggested that *any* facilities-based competition in the foreign market should be sufficient to relax the Commission's "No Special Concessions" rule. See Rules and Policies on Foreign Participation in the U.S. Telecommunications Market, *Report and Order on Reconsideration*, 12 FCC Rcd. 23,891 (1997) at ¶ 159. The Commission rejected this argument on the grounds that the existence of facilities-based competition does not necessarily mean that the dominant carrier no longer possesses the ability to exercise market power. Id. Here, by contrast, the fact that a non-dominant carrier has demonstrated its ability to terminate traffic on behalf of a U.S. carrier means that there is, in fact, a proven competitive alternative to the dominant carrier. Whatever market power the dominant carrier may still retain in an adjacent market, it would be unable to whipsaw U.S. carriers in view of the competitive alternative.

restrictions that the ISP places on competition will no longer be necessary. As the Commission observed in the NPRM, "the ISP's restraints on competition are counterproductive on routes where there are alternative means of terminating traffic in the foreign market."[4]

Accordingly, the Commission should amend its proposed regulation to permit all carriers in a foreign market to enter into unrestricted settlement arrangements with U.S. carriers once a non-dominant foreign carrier has entered into a settlement arrangement with an U.S. carrier. This amendment would preserve the essential purpose of the proposed exception, but would also extend the pro-competitive benefits of the proposal by expanding the class of eligible carriers in competitive markets.[5]

II. APPLICATION OF THE ISP ON ROUTES WHERE TRAFFIC IS SETTLED AT THE BENCHMARK RATE

In the NPRM, the Commission proposes to lift the ISP on routes where it has already authorized International Simple Resale ("ISR"). Under the Commission's ISR rules, U.S. carriers may serve routes via ISR where the destination country is found by the Commission to offer equivalent resale opportunities, or where 50 percent of the traffic is settled at or below benchmark

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[4] NPRM at ¶ 8.

[5] If the Commission were to adopt this proposal, there would need to be some minimum filing requirement so that other carriers were aware of the fact that a non-dominant carrier had entered into a settlement arrangement pursuant to the exception. This notice would not need to identify the non-dominant carrier or provide any other information about the terms of the agreement.

rates.[6] TISA supports this proposal, which is based on the Commission's assessment that "[w]here settlement rates are low, the dangers to U.S. consumers from whipsawing are diminished."[7] The Commission should promote further competition by permitting any individual foreign carrier that offers to settle at or below the benchmark rate with U.S. carriers to enter into alternative settlement rate agreements.

An example will illustrate the pro-competitive benefits of this proposal. Assume a WTO Member country that has four carriers each with a 25% market share. One of those carriers, which is also dominant in the local market, enters into an agreement with at least one U.S. carrier at the benchmark rate. In addition, the foreign carrier is willing to settle with all other U.S. carriers at the benchmark rate. In this scenario, U.S. carriers should also be permitted to enter into alternative agreements with that carrier even though only 25% of the traffic terminating in the U.S. on this route is at the benchmark rate.

There are several pro-competitive benefits of this proposal. First, the Commission would be providing a significant incentive to the foreign carrier to settle at the benchmark rate. Otherwise, the foreign carrier might delay decreasing settlement rates until the other carriers in the foreign country do the same. Second, once one foreign carrier has reduced its settlement rate and possibly entered into alternative settlement rate agreements, then there will be competitive pressure on the other carriers to do the same. Third, there is little

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[6] See 47 C.F.R. § 63.18(e)(4).

[7] NPRM at ¶ 26.

competitive risk since the foreign carrier has agreed to settle with all U.S. carriers at the benchmark rate.[8]

As the Commission concluded in the NPRM, "[t]he potential negative effect on U.S. carries and consumers of whipsawing by a foreign carrier that has already agreed to settle traffic at or below benchmark rates in a WTO country may be outweighed by the pro-competitive effect that removing the ISP will have on the U.S. international service market."[9]

The Commission also seeks comment on whether a settlement rate threshold lower than a benchmark rate would provide a more appropriate basis upon which to lift the ISP. In particular, the Commission seeks comment on whether it should apply the current "best practices" rate of $.08 per minute as the threshold.[10] TISA does not believe that a threshold lower than the current benchmark rate would provide an appropriate standard. To begin with, the Commission's benchmark rates already establish a level at which settlement rates presumptively approximate market-based rates and adequately protect the interests of U.S. consumers. If the Commission's goal is to adopt a policy that balances the potential for whipsawing against the pro-competitive effect that lifting

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[8] As noted in Section I, above, the ISP should also be lifted for all carriers where there is competition for terminating U.S. international traffic.

[9] NPRM at ¶ 27.

[10] The "best practices" rate was established in the Commission's Benchmarks Order. See International Settlement Rates, IB Docket No. 96-261, *Report and Order*, 12 FCC Rcd. 19,806 (1997) ("Benchmarks Order") at ¶¶ 121-135. It applies only on affiliated routes where there the Commission has detected evidence of market distortion. In fact, the Commission has not yet had an occasion to apply the best practices rate.

the ISP would have for U.S. services to a particular country, the benchmark rate is clearly the most appropriate place at which to strike that balance. Moreover, the "best practices" rate adopted by the Commission in the *Benchmarks Order* is based upon the lowest settlement rate in existence between U.S. and foreign carriers.[11] Plainly, this is an overly-restrictive basis upon which to liberalize international services to WTO member countries that either offer equivalent resale opportunities or substantially satisfy the Commission's benchmark rates.

If the Commission no longer applies the ISP with regard to certain liberalized markets, the Commission should also lift all accounting rate filing requirements for agreements with foreign carriers in those markets. In circumstances where the Commission is no longer applying the ISP, the risk that a public filing requirement will inhibit the negotiation of competitive settlement arrangements outweighs whatever residual benefit would be derived from imposing such a requirement.

Respectfully submitted,

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[11] Id. at ¶ 132.